NO. 42347-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

RICHARD KUNTZ AND CYNTHIA L. JOHNSON-KUNTZ,

Appellant,

v.

JPMORGAN CHASE BANK,

Respondent.

BRIEF OF RESPONDENT JPMORGAN CHASE BANK, N.A.

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I. INTRODUCTION

When a lienholder forecloses nonjudicially on a deed of trust securing a promissory note that is in default and sells the property at a trustee's sale, that lienholder is barred from seeking to also recover the difference between the sale price and the remaining balance due on the Promissory Note. This is known as an impermissible "deficiency judgment." *See* RCW 61.24.100. Appellants argue the Court should bar a junior lienholder, which protects its security interest in real property by purchasing that real property at a senior lienholder's trustee sale, from recovering surplus funds generated by the trustee's sale. Because a foreclosing senior lienholder is barred from obtaining a deficiency judgment, Appellants argue the Court should bar a junior lienholder from recovering surplus funds because, they suggest, those funds are a disguised deficiency judgment. Appellants are mistaken.

A deficiency judgment attaches to a person, while recovery of surplus funds attaches to a *res* (funds) already in a court's possession. The statutes governing these two different methods of recovery recognize this distinction, as do the cases addressing these remedies—including the cases cited by Appellants. The Kuntzes attempt to obfuscate the legislature's definitions of what qualifies as "surplus funds" and a "deficiency judgment" to support their arguments. But there is no valid basis to

analogize a recovery of surplus funds with a deficiency judgment. JPMorgan Chase Bank, N.A. ("Chase") asks the Court to affirm the surplus fund award for the following reasons:

First, Chase was not the purchaser at the trustee's sale. Rather, Homesales, Inc. ("Homesales") purchased the property. As such, Appellants' argument is inapplicable to the facts before the Court.

Second, to the extent Appellants' argument is premised on their belief that Chase will be unjustly enriched if it sues them under their Promissory Note, their claim is not ripe because Chase is not seeking to hold Appellants personally liable on their Note.

Third, both the deficiency judgment and surplus funds statutes are unambiguous, so the Court should not engage in a statutory construction analysis.

Fourth, the fair market value limitation imposed in other jurisdictions applies only when a junior lienholder seeks to hold its borrowers personally liable under a promissory note, and it is therefore not applicable because Chase is not presently seeking such a recovery.

Fifth, Appellants' windfall theory fails because, even after the award of surplus funds, Chase still lost over $40,000 by extending Appellants a loan, and Appellants thus have no valid basis for their claim to the surplus funds.

Sixth, Chase's security interest (the junior lien) did not merge with title to the property at the trustee's sale on the senior lien.

Seventh, prohibiting junior lienholders from recovering surplus funds will harm borrowers, discourage lending, frustrate the purposes of Washington's Deed of Trust Act, and create an ineffective and inefficient system.

II. ASSIGNMENTS OF ERROR

Appellants' identified error is: "determining that Complete Bowling Service Company is entitled to surplus funds, as junior lienholder, despite the fact that it was the successful bidder at the trustee sale." App. Brief at 5.

Chase assumes Appellants' assignment of error should have read: "determining that ***Chase*** is entitled to surplus funds, as junior lienholder, despite the fact that it was the successful bidder at the trustee sale."

III. STATEMENT OF CASE

On or about September 10, 2002, Appellants borrowed $265,000 from National City Mortgage (the "National City Loan"). CP 22. This loan was evidenced by a Note and secured by a Deed of Trust on real property

having a common address of 414 Lorenz Road KPN Lakebay, Washington 98349-9691 (the "Property").[1] *Id.*

On or about July 24, 2006, Appellants executed a WaMu Equity Plus Deed of Trust in favor of Washington Mutual Bank ("WaMu") that provided Appellants with a $480,000 home equity line of credit (the "HELOC"). CP 34-40. The HELOC was also secured by the Property. *Id.* On or about November 30, 2007, Appellants and WaMu entered into a Modification of the WaMu Equity Plus Security Instrument, which increased the HELOC's line of credit to $500,000. CP 41-46.

By July 2010, Appellants were in default of the National City Loan CP 3-6. PNC Mortgage, a division of PNC Bank, NA ("PNC Bank"), is the successor by merger to Accubanc Mortgage, which was a division of National City Bank of Indiana. By January 2011, PNC Bank had acquired ownership of the National City Loan. On January 14, 2011, Northwest Trustee Services, Inc. ("NWTS"), as trustee for PNC Bank, conducted a trustee's sale of the Property. CP 22-23. Homesales, Inc. ("Homesales") purchased the Property at that trustee's sale for $410,100. *Id.* As a result of the trustee's sale, the trustee issued a Trustee's Deed in favor of Homesales. *Id.* Thus, as of January 20, 2011, Homesales was the owner of

[1] The legal description of the Property is: South 200 feet of Government Lot 4 in Section 36, Township 21 North Range 1 West of the W.M. in Pierce County, Washington. Together with the Second Class Tidelands and Adjoining. Located in Pierce County, Washington.

the Property. On October 25, 2011, Homesales sold the Property to a third party purchaser. *See* Attachment A (Real Estate Excise Tax Affidavit).[2] There is no evidence in the record that Chase ever acquired an interest in the Property after the trustee's sale.

At the time of the trustee's sale, the amount owing on the National City Loan was $192,311.75. CP 2. After deducting the trustee's costs and fees, the trustee's sale generated a surplus of $216,919.25. *Id.* Pursuant to its statutory obligations, the Trustee deposited these surplus funds into the registry of the Pierce County Superior Court. CP 1-2. The court subsequently distributed those surplus funds to Chase. CP 211-212.

At the time of the trustee's sale, Appellants owed Chase $277,568.28 under their HELOC. CP 47.

IV. ARGUMENT

A. Standard of Review

To the extent Appellants challenge the propriety of the order disbursing surplus funds entered by Judge Nelson, that order is reviewed under an abuse of discretion standard. *Wilson v. Henkle*, 45 Wn. App. 162,

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[2] Chase respectfully requests the Court take judicial notice of the Real Estate Excise Tax Affidavit because it is a certified copy of a publicly recorded document that is capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned (the King County Recorder). *See* Evid. Rule 201(b); *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726 (2008); *see also State v. Royal,* 122 Wn.2d 413, 417-18 (1993) (appellate courts, including the Washington Supreme Court, may take judicial notice of facts which are properly subject thereto under Evid. R. 201); *Grassmueck v. Barnett*, 281 F. Supp. 2d 1227, 1233 (W.D. Wash. 2003).

166 (1986) (citing *State v. Scott*, 92 Wn.2d 209, 212 (1979)). But to the extent Appellants challenge the legality of the surplus funds statute or ask the Court to interpret that statute, those legal issues are reviewed *de novo*. *Beal Bank, SSB v. Sarich*, 161 Wn.2d 544, 556 (2007) (citation omitted).

B. Chase Did Not Purchase The Property At The Trustee's Sale.

Appellants argue that the Court should bar a junior lienholder that purchases real property—which acted as security for both the junior lien and the senior lien being foreclosed—at a senior lienholder's trustee sale from recovering surplus funds. *See* App. Brief at 5. Even if Appellants are correct (and they are not, for the reasons set forth in this Brief), the Court should still affirm the disbursal order because ***Chase did not purchase the Property at the trustee's sale***. As such, Appellants' argument misses the mark.

It is undisputed that WaMu extended Appellants a HELOC in 2007. CP 34-40. Chase acquired WaMu's interest in that HELOC on September 25, 2008, when WaMu failed and Chase acquired most of its assets from the FDIC, acting as receiver. There is no dispute that Chase is therefore the junior lienholder, and it is also undisputed the trial court awarded the surplus funds to Chase. CP 211-212.

Similarly, it is undisputed that Homesales purchased the Property at the trustee's sale. CP 22; App. Brief at 5. Homesales later resold the Property to a third party buyer. *See* Attachment A. The undisputed facts therefore establish that Chase did ***not*** purchase the Property at the trustee's sale. Although Appellants summarily claim that "Home Sales Inc. [*sic*], [ ] is a wholly owned subsidiary of Chase," there is no evidence in the record before the Court supporting this conclusory assertion. And even if there were such evidence in the record, Appellants do not offer any legal basis for why the acts of Homesales should be imputed to Chase. As a result, a fundamental premise of Appellants' argument—that Chase, as junior lienholder, purchased the Property at the trustee's sale—is demonstrably false. Consequently, the Court should affirm the disbursal order.

C. Appellants' Claim Is Not Ripe Because Chase Is Not Seeking To Hold Appellants Personally Liable On The HELOC.

Although not expressly stated in Appellants' Brief, it appears that Appellants' primary concern is that a junior lienholder may (1) purchase debtors' property at a trustee's sale, (2) seek surplus funds, and (3) then seek to hold those debtors personally liable under the junior promissory note. *See* App. Brief at 8, 14-16.

If this is Appellants' concern, the Court should affirm the surplus fund disbursal order for the simple reason that Appellants' claim is not

ripe. *See infra* section IV(E). As in *Beal Bank*, the Court need "not herein address the matter of a junior deed of trust holder's continued right to sue the debtor on the promissory note because it is not before [the Court]." 161 Wn.2d 544, 550 (2007). There is no evidence before the Court suggesting that Chase is attempting to collect any amount from Appellants under its HELOC. This evidence is not before the Court ***because Chase is not currently seeking to hold Appellants personally liable on the HELOC.***

Appellants correctly explain that "there is no authority in Washington law for allowing ***any*** lienholder to sue for a deficiency following a nonjudicial foreclosure sale." *Wash. Mut. Sav. Bank v. United States*, 115 Wn.2d 52, 55 (1990) (emphasis added). Plaintiffs misinterpret this holding to argue that "the holding in *Washington Mutual* is still valid and should serve to bar a purchasing junior lienholder's post-foreclosure recovery." App. Brief at 13. *Washington Mutual* addresses only whether a junior lienholder may ***sue*** a debtor to obtain a deficiency judgment. "A nonforeclosing junior lienholder who purchases property at a nonjudicial foreclosure sale may not ***sue*** for a deficiency." *Wash. Mut.*, 115 Wn.2d at 59 (emphasis added). *Washington Mutual* does not address which entities are entitled to recovery from surplus funds available after a trustee's sale.

Washington Mutual is not applicable to the instant case because Chase is not suing Appellants.

The exact issue before the Court was adjudicated by both the California Court of Appeals and Nevada Supreme Court (two jurisdictions cited by Appellants in support of their argument) over twenty years ago. *See Pac. Loan Mgmt Corp. v. Superior Court of Santa Clara*, 196 Cal. App. 3d 1485 (1987); *Citibank Nev., N.A. v. Wood*, 753 P.2d 341, 341 (1988). The borrowers in *Pac. Loan* made the same arguments as Appellants—a junior lienholder should not be awarded surplus funds because it may seek to collect on the underlying obligation. *See id.* at 1493-95. The California Court of Appeals rejected this argument, in part because the creditor was not seeking to hold the debtors personally liable. *See id.* at 1495 ("we are not yet measuring what deficiency judgment, if any, [creditor] may collect against [debtor]. We deal instead with the surplus"). The Nevada Supreme Court rejected an identical argument, holding that a purchasing junior lienholder ***is*** entitled to surplus funds from a trustee's sale. *Citibank Nev.*, 753 P.2d at 342

Because Chase is not presently seeking to collect on Appellants' promissory note, the issue of whether Chase may seek to hold Appellants personally liable on the HELOC is not before the Court. Appellants' claim is therefore not ripe, and the Court should affirm the disbursal order.

D. The Pertinent Statutes Are Unambiguous, So The Court Should Not Engage In A Statutory Construction Analysis

Appellants ask the Court to construe the surplus funds statute so that junior lienholders who purchase secured property at a senior lienholder's trustee sale may never recover surplus funds and to also construe the deficiency judgment statutes in such a way that a junior lienholder may seek a deficiency judgment after a non-judicial foreclosure. But the Court should not engage in any statutory construction analysis because all of the statutes at issue are unambiguous.

"If the meaning of a statute is plain on its face, then the court ***must*** give effect to the plain meaning as an expression of legislative intent." *Udall v. T.D. Escrow Svcs., Inc.*, 159 Wn.2d 903, 909 (2007) (emphasis added). A "court does not subject an unambiguous statute to statutory construction." *Cerrillo v. Esparza*, 158 Wn.2d 194, 210 (2006). Only when statutory language is susceptible to "more than one reasonable interpretation" should a court find a statute ambiguous and engage in a statutory construction analysis. *Udall*, 159 Wn.2d at 909. There is no need for the Court to engage in statutory interpretation of either the surplus funds or deficiency judgment statutes because neither statute is ambiguous.

1. The Surplus Funds Statute Is Not Ambiguous.

The surplus funds statute is unambiguous. It requires that surplus funds from any trustee's sale to be deposited with the superior court where the property is located. RCW 61.24.080(3). The court is then tasked with providing notice to all parties with an interest in the just-sold property, so that each entity may submit its claim to the surplus funds. *Id.* "Interests in, or liens or claims of liens against the property eliminated by the sale under this section ***shall*** attach to the surplus in the order of priority that it had attached to the property." RCW 61.24.080 (emphasis added). Thus, claims attach to the surplus funds "in the order of priority" that the claims attached to the secured property. The surplus funds statute does not provide exceptions or exclusions.

Washington courts uniformly find the statute leaves no room for discretion and "provides that a ***creditor's interest in the excess proceeds from a nonjudicial foreclosures sale pursuant to a deed of trust continues at the same priority as the creditor's interest in the property***." *See In re Upton*, 102 Wn. App. 220, 224 (2000) (emphasis added). "It is clear that interest in and liens upon the property are transferred to the excess proceeds." *Sweet v. O'Leary*, 88 Wn. App. 199, 202 (1997). "The priority of competing creditors' rights to the surplus proceeds of a

trustee's sale is determined by the order in which the creditors' liens attached to the property." *In re Deal*, 85 Wn. App. 580, 583 (1997).

Even Appellants concede that the surplus funds statute is unambiguous and "treats the competing claims to the surplus funds in the same priority as they would have existed against the property prior to the foreclosure." App. Brief at 4. Rather than identify an ambiguous term, Appellants ask the court to read the statute in such a manner that "the surplus funds are treated as part of the deficiency scheme." App. Brief at 8. But the Court should not create ambiguity where none exists. Because the surplus funds statute is unambiguous, the Court need not engage in any statutory construction analysis.

2. The Deficiency Judgment Statute Is Unambiguous and Applies Only To Judicial Residential Foreclosures.

The deficiency judgment statute is equally unambiguous: "[A] deficiency judgment ***shall not*** be obtained on the obligations secured by a deed of trust against any borrower, grantor or guarantor after a trustee's sale under ***that*** deed of trust." RCW 61.24.100 (emphasis added). Thus, the only way a creditor may obtain a deficiency judgment is through a judicial foreclosure. As a result, deficiency judgments are governed by RCW Chapter 61.12 (Foreclosure of Real Estate Mortgage and Personal Property Liens), ***not*** RCW Chapter 61.24 (Deeds of Trust), as Appellants

allege. In short, the deficiency judgment statute provides that a decree of foreclosure may require the debtor to personally satisfy "the balance due on the mortgage, and costs which may remain unsatisfied after the sale of the mortgaged premises...from any property of the mortgage debtor." RCW 61.12.070.

Here, Chase is not seeking to recover any amount from Appellants. Chase has not filed suit to hold Appellants personally liable for any amount owing under the HELOC, nor has it pursued any other action to further a personal recovery from Appellants. Chase is therefore not seeking a deficiency judgment. Nor could it, because the statute provides that a creditor may only seek a deficiency judgment after a judicial foreclosure.

The Washington Supreme Court is unequivocal: "there is no authority in Washington law for allowing ***any*** lienholder to sue for a deficiency following a nonjudicial foreclosure sale." *Wash. Mut.*, 115 Wn.2d at 55 (emphasis added); *see also Queen City Sav. & Loan Ass'n v. Mannhalt*, 111 Wn.2d 503, 512 (1988) ("lenders surrendered their right to a deficiency judgment in nonjudicial foreclosures of deeds of trust"); *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 416 (1988); *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 169 (2008) ("nonjudicial foreclosure procedure...bars any deficiency judgment"). In other words,

"Washington law provides that no deficiency judgment may be obtained when a deed of trust is foreclosed." *Wash. Mut.*, 115 Wn.2d at 58. Thus, the premise of Appellants' argument—that a junior lienholder may seek a deficiency judgment after a nonjudicial foreclosure—is demonstrably false. Once the trustee's sale occurred, any creditor of Appellants that owned a security interest in the Property is barred from seeking a deficiency judgment.[3]

There also cannot be a deficiency judgment because Chase did not foreclose on its deed of trust. *See* RCW 61.24.100(1); *Boeing Employees' Credit Union v. Burns*, --- Wn. App. ---, 2012 WL 975418, *8 (Mar. 19, 2012). Less than two weeks ago, in *Burns*, Division One rejected a similar argument advanced by Appellants' attorney (who represented Burns). In *Burns*, "the Burnses claimed that permitting BECU to enforce its right to claim a portion of the surplus funds after entry of judgment on the note violates the anti-deficiency provisions of the Deeds of Trust Act." *Id.* Division One rejected this argument because the junior creditor did not conduct a trustee's sale under its deed of trust. "Moreover, there will never be a trustee's sale under the [junior lienholder's] deed of trust. That is because the trustee's sale directed by [the senior lienholder] eliminated the

[3] To the extent Appellants are arguing that Chase should not be permitted to seek to hold Appellants personally liable under the HELOC, that argument is not ripe and is therefore not properly before the Court. *See supra* section IV(C).

lien of the [junior] deed of trust against the real property sold at the sale." *Id.* Consequently, Division One concluded "there has not been and never will be any violation of the 'anti-deficiency' provisions of RCW 61.24.100(1)." *Id.* The same rationale applies here.

3. An Award of Surplus Funds Is Not Analogous To a Deficiency Judgment.

A recovery of surplus funds is not analogous to a deficiency judgment. A recovery of surplus funds occurs when an entity seeks recovery of a *res* (money) already in a superior court's registry. *See* RCW 61.24.080(3). Thus, recovery of surplus funds is essentially a *quasi in rem* action. This is evidenced by the procedure to acquire surplus funds. "A court which has custody of funds has the authority and the duty to distribute the funds to the party or parties that show themselves entitled thereto." *Wilson v. Henkle*, 45 Wn. App. 162, 169 (1986). When disbursing surplus funds, a court may only distribute the funds in its possession and lacks authority to attach a judgment to any debtor. If there are no surplus funds from a trustee's sale, there is no distribution to any junior creditor.

On the other hand, a deficiency judgment attaches to "other property of the judgment debtor." RCW 61.12.100. A deficiency judgment is therefore analogous to a personal judgment against the debtor—it "may

be made a lien upon the property of a judgment debtor as other judgments, and the collections thereof enforced in the same manner." RCW 61.12.080; *see also CKP, Inc. v. GRS Const. Co.*, 63 Wn. App. 601, 622 (1991) ("A personal judgment will be enforced only if there is a deficiency judgment"). When a court awards a deficiency judgment, the deficiency judgment creditor may seek recovery from any property owned by the deficiency judgment debtor. This is in stark contrast to an award of surplus funds and is the fundamental reason the two remedies are not analogous. *See Boedeker v. Jordan*, 79 B.R. 843 (Bankr. E.D. Mo. 1986) (junior lienholder "is not claiming funds from [debtors] personally, but claim the surplus from the foreclosure sale").

Appellants argue that if a junior lienholder "recovers surplus funds, then that creditor reduces its deficiency claim against the debtor by the amount of surplus funds that it recovered." App. Brief at 8. Appellants are mixing terms, in an attempt to support their argument. Surplus funds are available ***only*** after a trustee's sale, which is the result of a non-judicial foreclosure. *See* RCW 61.24.080. Conversely, a deficiency judgment is available ***only*** after a court issues a decree of foreclosure, which results from a judicial foreclosure. *See* RCW 61.12.070. The Washington Supreme Court has recognized this distinction when discussing the balance achieved by the Deed of Trust Act: "By giving up the right to a

deficiency judgment, however, the secured party did not also give up the right to realize upon the security given." *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 416 (1988). Thus, while a junior lienholder may seek to hold its borrower personally liable for its debt (which Chase is not presently doing here), it cannot seek a deficiency judgment.

a. Deficiency judgments are available in non-judicial foreclosures of commercial loans, but not residential loans

Appellants argue the Washington Court of Appeals "analogized a recovery from surplus funds with a deficiency," citing *In re Trustee's Sale of Real Prop. of Brown*, 161 Wn. App. 412 (2011). App. Brief at 9. Appellants argue that *In re Brown* therefore supports their argument that a deficiency judgment may exist after a trustee's sale occurs at the culmination of a non-judicial foreclosure on residential property. Appellants are mistaken and fail to mention that *In re Brown* deals with a ***commercial*** loan, not a residential loan. 161 Wn. App. at 413 ("they obtained a $200,000 ...commercial loan"). Although the Browns secured their commercial loan with a deed of trust on their residence, it is undisputed the loan at issue was a "Small Business Administration (SBA) ***commercial loan***." *Id.* (emphasis added). In fact, the statute quoted by Appellants specifically provides: "A guarantor granting a deed of trust to secure its guaranty of a ***commercial loan shall be subject to a deficiency***

judgment following a trustee's sale." RCW 61.24.100(6) (emphasis added). The Washington legislature specifically carved out this exception for commercial loans: "Except to the extent permitted in this section for deeds of trust securing ***commercial*** loans, a deficiency judgment ***shall not*** be obtained on the obligations secured by a deed of trust." RCW 61.24.100(1) (emphasis added).

Appellants are therefore not asking the Court to construe or interpret the deficiency judgment statute. Rather, Appellants ask the Court to re-write the statute, such that the limited exception providing for a deficiency judgment on a commercial loan swallows the rule prohibiting deficiency judgments in residential loans. "The fundamental rule of statutory construction requires that language within a statute be construed to have a meaning and purpose, and that it not be rendered superfluous." *Connolly v. State*, 79 Wn.2d 500, 503 (1971). Appellants ask the Court to rewrite RCW 61.24.100 such that the exception is made superfluous. There is no basis for the Court to rewrite the statute in such a manner, and it should not do so.

b. The Court should not rewrite either the deficiency judgment statute or the surplus funds statute

Appellants ask the Court to rewrite both the deficiency judgment and surplus funds statutes to render significant portions of each obsolete,

in their attempt to prevent a junior creditor from recovering surplus funds. The Court should not rewrite either statute.

A judicial foreclosure action may be initiated by "the mortgagee or his assigns...in the superior court of the county where the land, or some part thereof, lies, to foreclose the equity of redemption contained in the mortgage." RCW 61.12.040. As part of a judicial foreclosure, "the court shall direct in the decree of foreclosure that the balance due on the mortgage, and costs which may remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any property of the mortgage debtor." RCW 61.12.070. Thus, a deficiency judgment is defined as: "the balance due on a mortgage and costs which may remain unsatisfied after the [sheriff's] sale of the mortgaged premises." *Id.* (Notably, RCW Chapter 61.12 uses the term "deficiency" in five section headings. *See* RCW 61.12.061-.080, .094 & .110.)

Appellants ask the Court to rewrite the judicial foreclosure and deficiency judgment statutes in the following ways: (1) removing the requirement that a deficiency judgment result from an action "in the superior court of the county where the land...lies," RCW.61.12.040; and (2) adding the phrase "or from the surplus funds proceeds" to the requirement that a deficiency judgment may "be satisfied from any property of the mortgage debtor," RCW 61.12.070. The Court should do

neither because it should not construe a statute in a way that renders any portion superfluous, *Connolly*, 79 Wn.2d at 503, and "a court must not add words where the legislature has chosen not to include them." *Restaurant Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682 (2003).

Appellants also ask the Court to add words to the surplus funds statute, which reads, in pertinent part: "Interests in, or liens or claims of liens against the property eliminated by the sale under this section shall attach to the surplus in the order of priority that it had attached to the property." RCW 61.24.080(3). Appellants ask the Court to add the phrase "except as to junior lienholders who purchase the property sold at the trustee's sale," so that the surplus funds statute would read: "Interests in, or liens or claims of liens against the property eliminated by the sale under this section shall attach to the surplus in the order of priority that it had attached to the property, except as to junior lienholders who purchase the property sold at the trustee's sale." Again, the Court "must not add words where the legislature has chosen not to include them." *Restaurant Dev.*, 150 Wn.2d at 682. Because Appellants ask the Court to "construe" both the deficiency judgment and surplus funds statutes in a manner that adds words, while simultaneously rendering others superfluous, the Court should deny Appellants' request.

E. The Fair Market Value Limitation Imposed In Other Jurisdictions Is Not At Issue Because Chase Seeks To Recover Only Surplus Funds.

Although Appellants insist on using the term "deficiency judgment," Appellants' argument suggests they may, in fact, be arguing that the Court should apply a fair market value limitation on the amount a junior lienholder may recover, as the out-of-state cases cited by Appellants address such a limitation. *See* App. Brief at 14-16.

In short, a fair market value limitation limits a creditor's recovery, in an action to hold debtors personally liable for amounts owing under the loan, to the lesser of the excess of the indebtedness over (a) the fair market value of the property, or (b) the price paid at the trustee's sale. *See, e.g., Walter E. Heller Western, Inc. v. Roger W. Bloxham*, 176 Cal. App. 3d 266, 270 (1985); *Carrillo v. Valley Bank of Nev.*, 734 P.2d 724, 725-25 (Nev. 1987). Whether the Court should (or should not) apply a fair market value limitation is immaterial, as Chase is not presently seeking to hold Appellants personally liable under the HELOC. As such, Appellants' concerns about implementing a fair market value limitation to a junior lienholder's recovery from its borrower, after it purchases the secured property at a senior creditor's trustee's sale, is not properly before the Court.

Every case Appellants cite addresses whether a foreclosing junior lienholder may seek to hold a borrower personally liable for the amount owing on her debt. In the Nevada action, the creditor sought "to recover the full remaining balance of the [debtor's] promissory note irrespective of the fair market value of the secured property it acquired." *Carrillo*, 734 P.2d at 724. Similarly, in the Alaska action, the junior lienholder foreclosed on the property and then "filed suit against [debtor] on the promissory note." *Adams v. FedAlaska Fed. Credit Union*, 757 P.2d 1040, 1041 (Alaska 1988). Finally, in the California action the creditor "brought a deficiency action against [debtor] for the full value of the $288,000 promissory note." *Walter E. Heller*, 176 Cal. App. 3d at 270. But none of these cases address distribution of surplus funds. And, in fact, Nevada and California courts issued opinions after the above-identified cases that specifically find those cases do ***not*** control a junior lienholder's claim to surplus funds. *See Pac. Loan Mgmt. Corp. v. Superior Court of Santa Clara County*, 196 Cal. App. 3d 1485, 1492-95 (1987); *Citibank Nev., N.A. v. Wood*, 753 P.2d 341, 341 (1988).

Two years after it issued the *Heller* opinion, the California Court of Appeals was presented with the exact question presented by Appellants: "whether [junior lienor's] status as buyer at the foreclosure sale should cut off its rights as junior lienor to have its debt satisfied out of the surplus."

Pac. Loan, 196 Cal. App. 3d at 1492. The court held that a junior lienor ***should*** be able to recover surplus funds after purchasing the secured property at a senior lienor's trustee's sale, and the court's reasoning is instructive. *See id.*

In *Pac. Loan*, as in the present case, the borrowers argued that allowing a junior lienor to claim surplus funds prejudices the borrowers because the junior lienor may realize a profit on the sale of the property and also seek to personally recover from borrowers the amount owing under their loan. *Id.* at 1493-94. The court disagreed, finding the borrowers would be in the same position regardless of whether the junior lienor or a third party purchased the property at the senior lienor's trustee's sale:

> Whether [junior lienor], or a third party (X), bought the property, [the borrowers] would be in precisely the same position: the property would belong to another, and [the borrowers] would no longer be liable for the debts which were discharged in the foreclosure sale. ***Whether [junior lienor] or X is the owner of the property makes no difference so far as [borrower's] economic position is concerned.***

Id. at 1494 (emphasis added). Appellants are in the same position. Regardless of whether Chase or a third party purchased the Property at the trustee's sale, the Property would belong to another and they would no longer be liable for the debts discharged in the foreclosure sale. *Heller* is therefore inapposite. Further, prohibiting the junior lienholder from

bidding a trustee's sale would, in most cases, harm the borrower. *See infra* section IV(H)(1).

The *Pac. Loan* court specifically stated it was "not yet measuring" the amount that the junior lienor could recover on an action for damages under a promissory note but "deal[t] instead with the surplus funds generated by [junior lienor's] own overbid, a fund actually provided with cash out of [junior lienor's] pocket." *Id.* at 1495. Similarly, in this case, the Court need not adjudicate whether Chase may hold Appellants personally liable under the HELOC because that issue is not before the Court. The concerns present in *Walter E. Heller, Carrillo*, and *Adams* simply do not exist in the instant case. Rather, as in *Pac. Loan*, the only issue before the Court is whether Chase may recover surplus funds.

Similarly, one year after the *Carrillo* opinion, the Nevada Supreme Court opined that "[t]he *Carrillo* case ***did not limit a junior lienor's right to claim an interest in the surplus proceeds of a trustee's sale.***" *Citibank Nevada*, 753 P.2d at 341 (emphasis added). The court continued: "In *Carrillo* this court did not deal with an unsatisfied purchasing junior lienor's right to claim an interest in the trustee's sale proceeds; hence [*sic*] *Carrillo* does not control the instant case." *Id.* at 341-42. The Nevada Supreme Court distinguished between a junior lienholder seeking to collect surplus funds and one seeking a deficiency judgment, holding the

purchasing junior lienholder's "interest in the excess trustee's sale proceeds is superior to the interest held by the [ ] [ ] debtors and trustors." *Id.* at 342.

The jurisdictions issuing two of the three cases relied heavily on by Appellants subsequently issued opinions confirming a junior lienholder's right to surplus funds, even if the junior lienholder purchases the property at a senior's sale. Both courts opined that the concerns present when a junior lienholder seeks to personally recover from debtors do not apply when a junior lienholder seeks to recover surplus funds. There is no support for Appellants' argument.

F. Awarding Chase Surplus Funds Did Not Unjustly Enrich It, Nor Did The Award Harm Appellants.

1. Chase Lost Over $40,000 By Extending Appellants The HELOC.

Appellants argue that Chase will be unjustly enriched if it is awarded the surplus funds. But Appellants ignore the fact that Chase loaned Appellants $277,568.28, which Appellants never paid back, CP 47. Also, if the Court imputes the acts of Homesales to Chase, then Chase paid $410,100 in cash for the property.[4] CP 22-23.

[4] Although Chase denies that the acts of Homesales should be imputed to it, for purposes of the arguments contained in section IV(F) of this Brief, Chase will assume the Court imputes Homesales's actions to Chase.

Appellants' argument is identical to the argument advanced by the borrowers in *Pac. Loan*, who "argue[d] that [the junior lienor] now has the property, may sell it a profit, and will not have to account to [borrowers] for that profit." *Pac. Loan*, 196 Cal. App. 3d at 1493. As a result of this situation, the borrowers in *Pac. Loan* argued the junior lienor "is not equitably entitled to the surplus" and claimed *Walter E. Heller* controlled. *Id.* at 1493-94. The court rejected this argument, finding that the *Walter E. Heller* court's concerns are not present when a junior lienor purchases property at a senior's sale. *Id.* at 1494-95. Rather, the court recognized that the surplus generated by a junior lienor's bid is paid for "with cash out of [its] pocket." *Id.* at 1495. Because the money in the surplus fund is money ***actually paid*** by Chase (assuming the court imputes Homesales's actions to it), it is literally impossible for Chase to receive a double recovery. Rather, Chase is simply recovering some of the money it expended to protect its investment.[5]

Homesales purchased the Property at the trustee's sale for $410,100. CP 22-23. At the time of the trustee's sale, the amount owing on the HELOC was $277,568.28. CP 47. As of the date of the trustee's sale, then, assuming the actions of Homesales are imputed to Chase, Chase

[5] The *Pac. Loan* court also recognized that the amount recovered from surplus funds by a junior lienor may reduce the amount that junior lienor may recover in an action to recover under a promissory note. *Pac. Loan*, 196 Cal. App. 3d at 1495. But, as repeatedly mentioned, Chase is not currently seeking to recover under Appellants' Note.

had paid $687,668.28 in cash to Appellants and PNC Bank, to protect its interest in the property securing Appellants' debt.

Chase recovered $216,919.25 in surplus funds. CP 2. Homesales sold the Property on October 25, 2011, for $428,500. *See* Attachment A (Real Estate Excise Tax Affidavit).[6] The sum of the surplus funds recovered by Chase and the funds earned through the sale of the property (assuming for the sake of argument that the funds earned by Homesales through its resale of the Property are imputed to Chase) is $645,419.25.

The sum of the amounts Chase earned through acquiring surplus funds and from Homesales's resale of the Property are less than sum of the amounts Chase lent to Appellants and Homesales paid for the Property. Thus, even assuming Homesales's actions are imputed to Chase, ***Chase lost $42,249.03*** by extending a loan to Appellants. Under Appellants' theory (which vests title to the surplus funds in Appellants), Chase would incur a loss of $259,168.28 from extending Appellants a loan. This is not an equitable resolution. At the same time, Appellants would be unjustly enriched, as they would receive a windfall of over $216,000, even though they defaulted on almost $470,000 in loans.

If the Court does not impute the actions of Homesales to Chase, Chase suffered a loss of over $60,000, which represents the difference

[6] The Court may take judicial notice of the Real Estate Excise Tax Affidavit. *See supra* note 2.

between the amount owing on the HELOC ($277,568.28) and the surplus fund recovery ($216,919.25). Regardless of the framing of this issue, Chase lost money on Appellants' HELOC.

2. Appellants Do Not Have A Claim To Surplus Funds.

Appellants argue that awarding surplus funds to a junior lienholder subjects "the former homeowner...to a monetary detriment." App. Brief at 9. This presumes Appellants possessed some interest in the surplus funds, as they cannot suffer a detriment unless they have an interest to lose. But Appellants never had ***any*** interest in the surplus funds. *See Stulz v. Citizen's Bank & Trust Co.*, 160 S.W.3d 423, 429-30 (Mo. Co. App. 2005) (borrowers "had no right to possess surplus funds, [so] they had no valid claim").

In January 2011, when the trustee sold the Property at the trustee's sale, Appellants owed over $277,000 on their HELOC. CP 47. Homesales also spent $410,100 to purchase the Property at the trustee' sale. Thus, as of the date of this motion (and assuming Homesales's actions are imputed to it), Chase has spent over $687,000, while Appellants have defaulted on two loans with a combined principal balance of $469,880. CP 2 & 47. It is unclear what Appellants offer as the basis of their claim to the surplus funds, given that they defaulted on over $469,000 in loans, while Chase

has paid over $687,000 out of pocket to protect its interests in the property securing Appellants' debt. *See Stulz*, 160 S.W.3d at 430 (borrowers "should not be allowed to realize a gain at the expense of" a junior lien holder).

Further, Appellants would not have any claim to the surplus funds had a third party purchased the Property at the trustee's sale. Regardless of who purchased the Property at the trustee's sale, Appellants "would be in precisely the same position: the property would belong to another, and [Appellants] would no longer be liable for the debts which were discharged in the foreclosure sale. Whether [Chase] or [third party] X is the owner of the property makes no difference so far as [Appellants] [are] concerned." *Pac. Loan*, 196 Cal. App. 3d at 1494. It defies logic that Appellants' claim to the surplus funds is dependent upon the status of the purchaser. Either they have a right to surplus funds or they do not.

Appellants have no valid basis to claim they ever had a possessory or ownership interest in the surplus funds. Moreover, given the current facts, the identity of the purchaser of the Property at the trustee's sale could not affect Appellants' economic interests. Consequently, the court's awarding of surplus funds to Chase did not cause Appellants to suffer any detriment.

G. Chase's Security Interest Did Not Merge With Title At the Trustee's Sale.

Appellants argue Chase's HELOC merged with Homesales's title to the property at the trustee's sale, and, as a result, the HELOC was not "eliminated" (or discharged) by the trustee's sale, so Chase cannot seek to recover surplus funds. This argument fails for three reasons. First, the trustee's sale extinguished the HELOC, along with every junior security interest in the Property, so there is nothing to merge. Second, Chase did not purchase the property at the trustee's sale. Third, merger is disfavored and the facts evidence an intent that the HELOC not merge with title.

1. The Trustee's Sale Extinguished The HELOC.

Appellants' merger argument fails for the simple reason that its fundamental premise is false. Contrary to Appellants' argument, a trustee's sale ***extinguishes*** junior security interests at the same time it vests the purchaser with title to the property. *See Beal Bank*, 161 Wn.2d at 550 (bank's "rights in the collateral are ***extinguished*** by [the] trustee's sale") (emphasis added). In other words, "[a] nonjudicial foreclosure ***extinguishes*** all junior liens on the property." *In re Upton*, 102 Wn. App. 220, 224 (2000) (citing *Glidden v. Mun. Auth. of Tacoma*, 111 Wn.2d 341, 347 n.3 (1988)) (emphasis added); *see also U.S. Bank of Wash. v. Hursey*, 116 Wn.2d 522, 526 (1991) ("a junior lienor's interest will be

extinguished by being joined in the foreclosure of a senior lien"); *Mann v. Household Fin. Corp. III*, 109 Wn. App. 387, 392-93 (2001) ("nonjudicial foreclosure pursuant to chapter 61.24 RCW extinguishes all junior liens"); *DeYoung v. Cenex, Ltd.*, 100 Wn. App. 885, 895 (2000) ("junior lien was extinguished by a senior lien-holder's foreclosure").

The law in Washington is clear: A trustee's sale extinguishes all junior liens. Appellants fail to cite a single case supporting their merger argument. Because the trustee's sale eliminated Chase's security interest, there was no interest to merge at the trustee's sale.

2. Chase Did Not Purchase The Property At the Trustee's Sale.

Appellants' merger argument also fails because Chase did not purchase the Property at the trustee's sale. Appellants state that merger occurs when the "duty to pay and the right to receive [are] both vested in one person at the same time." App. Brief at 18 (citing *First State Bank v. Arneson*, 109 Wash. 346, 250 (1920)). But Chase did not purchase the Property at the trustee's sale. Homesales purchased it. CP at 22; App. Brief at 5. Homesales subsequently sold the Property to a third party purchaser. *See* Attachment A (Real Estate Excise Tax Affidavit).[7] Thus, at no time was the duty to pay and the right to receive payment vested in

[7] The Court may take judicial notice of the Real Estate Excise Tax Affidavit. *See supra* note 2.

the same entity. As a result, there could be no merger of Chase's interest, as a matter of law.

3. Neither Chase nor Homesales Intended To Merge Interests.

"Equity does not favor the doctrine of merger, and even though two or more rights or estates are united in one person, equity will keep them distinct where it appears from the intention of the person, either express or implied, that he wishes them to be so kept." *Altabet v. Monroe Methodist Church*, 54 Wn. App. 695, 698 (1989). Chase evidenced its intent that no merger occur through its actions. Regardless of Chase's relationship with Homesales, it was Homesales that purchased the Property at the trustee's sale. If Chase intended its HELOC to merge with title, it could have purchased the Property. But it did not. Because Chase did not purchase the property and equity does not favor merger, no merger occurred.

Division One rejected a similar/identical argument about ten days ago. In *Burns*, the homeowners claimed that entry of a judgment on a promissory note secured by a deed of trust merges that deed of trust into the judgment. *Burns*, No. 66420-4-I at 12. The court rejected the argument, noting that the Burnses "fail to cite any authority" supporting their arguments because "[t]here is no such authority in this state." *Id.*

Division One noted that the purpose of the merger rule is to "prevent vexatious relitigation of matters that have already passed into judgment," and there was no danger of such relitigation when foreclosing a deed of trust. *Id.* at 13 (quoting *Caine & Weiner v. Barker*, 42 Wn. App. 835, 837 (1986)). As in *Burns*, the Court should reject Appellants' merger argument because there is no legal basis for it and it does not further the goals of the merger doctrine.

H. Prohibiting Junior Lienholders From Recovering Surplus Funds Will Create Bad Public Policy.

The Court should also reject Appellants' arguments and affirm the disbursal of surplus funds because adopting Appellants' arguments will effect bad public policy in five ways. First, Appellants' argument would harm borrowers by increasing their potential personal liability. Second, Appellants' argument will discourage creditors from extending loans that are secured by junior liens. Third, it will frustrate the goals of the Deed of Trust Act by making non-judicial foreclosures more complicated and expensive. Fourth, awarding defaulting borrowers a windfall might increase the number of defaults. Fifth, there are no valid reasons to treat a junior lienholder differently than other entities when it purchases property at a trustee's sale. Finally, Appellants' argument would create an inefficient system.

1. Appellants' Argument Would Effectively Prohibit Junior Lienholders From Bidding At A Senior's Trustee Sale, Which Would Injure Borrowers.

Appellants' argument would have the effect of preventing junior lienholders from bidding at a trustee's sale because they would lose the ability to seek surplus funds. In most cases, this would lower the sale price at the trustee's sale, injuring the borrower.

In most cases, a non-foreclosing junior lienholder will purchase the property securing its loan at the senior lienholder's trustee sale (to protect the junior lienholder's interest from being eliminated). If a junior lienholder must choose between purchasing the property and seeking any other recovery (either under the Note or from surplus funds), that junior lienholder may opt not bid at the trustee's sale. This lack of competitive bids will lower the sale price and, in some cases, the property may be purchased through the senior lienholder's credit bid.

Regardless who purchases the property at this hypothetical trustee's sale, the borrower will be injured by the lower price. A lower price will necessarily create less (or possibly no) surplus funds. Any surplus funds collected by the junior lienholder will ***lower*** the amount the borrower may be held personally liable for on the junior loan. Consequently, the amount that junior lienholder could recover in an action to hold the defaulting

borrower would be ***reduced*** by the amount of its recovery. If the Court adopts Appellants' argument, a defaulting borrower's liability may be ***higher*** than situations where a junior lienholder both bids at a trustee's sale and recovers surplus funds. Appellants' approach will injure future borrowers by increasing their potential personal liability.

2. Prohibiting A Junior Lienholders From Recovering Surplus Funds Will Discourage Lending.

Both our local and national economies are based in large part on credit. Appellants seek to curtail the availability of credit by forcing a creditor with a junior lien on real property to choose between: (a) purchasing the real property at a senior lienholder's trustee's sale, to protect its investment; and (b) remaining idle during the trustee's sale, in the hopes that a purchaser will bid up the price to create a surplus. Under Appellants' argument, a junior lienholder could not do both. If it purchased the property, it could not recover surplus funds.

The effect of such a policy would be to "discourage lenders from granting second deeds of trust and from entering subordination agreements." *Upton*, 102 Wn. App. at 225. "Both of these services are important to consumers." *Id.* Another effect of such a policy would be to discourage development.

For example, if a developer owned land encumbered by a mortgage to the seller of the property and wanted to develop that land, she might approach the bank for a commercial loan that greatly exceeds the value of the seller's mortgage. Under the current system, the seller will frequently subordinate its interest to the bank, so the land may be developed. *See, e.g., Campanella v. Ranier Nat'l Bank*, 26 Wn. App. 418, 418-19 (1980). But if the seller's ability to recover on its loan is seriously diminished by being in a junior position, it will be less likely to subordinate its interest, which means the bank will not extend a loan to developer and the land will not be developed. Because Appellants' rewriting of the surplus fund and deficiency judgment statutes would discourage creditors from extending loans, the Court should reject Appellants' arguments.

3. Appellants' Argument Frustrates the Goals of the Deed of Trust Act.

The Washington Supreme Court has repeatedly stated that the Deed of Trust Act should promote three basic objectives. "First, the nonjudicial foreclosure process should remain efficient and inexpensive." *Cox v. Helenius*, 103 Wn.2d 383, 387 (1985). "Second, the process should provide an adequate opportunity for interested parties to prevent wrongful

foreclosure." *Id.* "Third, the process should promote the stability of land titles." *Id.*

Prohibiting a junior lienholder from acquiring surplus funds after a senior lienholder's trustee sale will decrease the efficiency and increase the expense of the non-judicial foreclosure process. Rather than a court distributing surplus funds in the same order as the seniority of the liens on the sold property, Appellants want to create a system in which a court must evaluate the nature of the purchaser on a case-by-case basis. Unnecessarily complicating the system through which a court awards surplus funds creates a less efficient and more expensive system.

4. Awarding a Windfall to Defaulting Borrowers Might Cause an Increase in Defaults.

They system Appellants argue for may also cause an increase in the number of borrowers who default on their loans, as a borrower might be more likely to default if there is a chance that borrower will receive a windfall in the form of surplus funds. For example, in Appellants' case, they defaulted on over $400,000 loans and, if the Court accepts their argument, they will receive a $216,000 windfall, even though they owe almost double that amount to two creditors. It is absurd to suggest that a borrower that defaults on a loan is entitled to recover any money before his or her creditors are paid. If the Court supports such a view, defaulting

on loans might become a lottery of sorts, in which hopeful borrowers, who have at least two loans secured by their residence, default on both loans to play their odds that they might recover surplus funds. This situation is absurd.

5. There Is No Good Reason To Treat Junior Lienholders Differently From Other Entities At A Trustee's Sale.

There is no valid basis to treat a junior lienholder differently than a third party at a trustee's sale. *See Seattle Mortg. Co., Inc. v. Unknown Heirs of Gray*, 133 Wn. App. 479, 497 (2006) ("any junior lien holder" may "claim[ ] a right in any surplus"). As discussed above, borrowers are economically indifferent to who purchases at the trustee's sale, as the result of the trustee's sale is the same with respect to the borrowers: they forfeit the property and are relieved of the debt foreclosed. "Whether [the junior lienholder] or [third party] X is the owner of the property makes no difference so far as [borrower] is concerned." *Pac. Loan*, 196 Cal. App. 3d at 1494.

Appellants argue that a junior lienholder has an advantage at a trustee's sale because it may overbid to the detriment of other bidders. But this ignores the reality that any recovery on its note by the junior lienholder (i.e. an action to hold the borrower personally liable for the debt) will be reduced by the amount it recovers from surplus funds. The

junior lienholder is therefore incentivized to ***not*** overbid; if it does, it may lose the ability to seek to hold its debtor personally liable for his or her debt. (And, in any event, the junior lienholder would simply be reclaiming its own funds.)

Moreover, the junior lienholder is already at a disadvantage because it already loaned the defaulting borrower money and is therefore starting its bidding at a loss. The bidding junior lienholder bears the risk that the property may sell at a deflated price—or possibly not sell at all—and the junior lienholder will suffer an even larger loss. And even if Appellants' argument is correct, Appellants lack standing to advance this argument as they were not bidders at PNC Bank's trustee's sale, so they could not possibly have been harmed by Homesales's bid.

Additionally, the junior lienholder cannot set the price of the senior's trustee's sale, so there is no danger of prejudice to the borrower. "Since, unlike the senior lienor, the junior cannot use his lien as a credit bid, he obtains no unfair leverage in the auction nor other advantage such as would make inequitable his claim to the surplus to satisfy his debt." *Pac. Loan*, 196 Cal. App. 3d at 1493. The concerns present in *Walter E. Heller* and the other cases cited by Plaintiffs are simply not present here.

The *Heller* court was concerned "that the junior lienor could[,] by making a low bid[,] increase the size of its recoverable deficiency

judgment and also theoretically receive valuable property more than sufficient to offset the amount of the lien." *Pac. Loan*, 196 Cal. App. 3d at 1494. In other words, the primary concern in *Heller* was that a junior lienholder would be enriched by his own underbid. To combat this situation, the court imposed a fair value limitation on the amount that junior lienor may recover, by reducing the amount the junior may seek to recover directly from the borrower. Here, there is no such concern because Chase is not presently seeking to recover from Appellants. Any concerns about a double-recovery are therefore moot.

6. Appellants' Argument Would Create An Inefficient System.

Even if the Court accepts Appellants' argument that a junior lienholder may not recover surplus funds, the result will be the same. The only difference is that additional resources will be expended, both by the courts and by the parties, to achieve that end.

If the Court reverses the disbursal order and awards Appellants the surplus funds, Chase still has the ability to sue on Appellants' obligation. *See Beal Bank*, 161 Wn.2d at 549 ("the obligation owed to a junior lienholder continues after a trustee's sale"). Thus, although Appellants might temporarily be awarded the funds, Chase would immediately file

suit against Appellants to recover the full amount owing on the loan—$277,568.28. Chase could also seek to attach the surplus funds.

Not only would the trial court likely award surplus funds to Chase, but Appellants would owe Chase an additional $60,000 out of their personal assets. Such a result would burden all parties involved, as well as the courts, which would be forced to adjudicate this new dispute. It is more efficient for a court to award Chase the surplus funds.

V. CONCLUSION

Appellants ask the Court to rewrite Washington law to prohibit a junior lienholder, which purchases property at a senior's trustee sale, from recovering surplus funds. But for the reasons identified above, there is no reason for the Court to rewrite either the deficiency judgment or surplus funds statutes to impose this restriction. Moreover, Chase did not purchase the Property at the trustee's sale and there is no evidence in the record

[Remainder of page intentionally left blank.]

before the Court that Homesales is a subsidiary of Chase. As such, Appellants' premise—that Chase purchased the Property—fails. For these reasons, the Court should affirm the disbursal order.

RESPECTFULLY SUBMITTED this 30th day of March, 2012.

Davis Wright Tremaine LLP
Attorneys for Respondent Chase

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ATTACHMENT A

Department of Revenue
Washington State

64799 KD

REAL ESTATE EXCISE TAX AFFIDAVIT

CHAPTER 82.45 RCW – CHAPTER 458-61A WAC

This form is your receipt when stamped by cashier.

PLEASE TYPE OR PRINT

THIS AFFIDAVIT WILL NOT BE ACCEPTED UNLESS ALL AREAS ON ALL PAGES ARE FULLY COMPLETED

(See back of last page for instructions)

☐ Check box if partial sale of property

If multiple owners, list percentage of ownership next to name.

1 SELLER GRANTOR

Name: Homesales, Inc.

Mailing Address: 2141 5th AVE

City/State/Zip: San Diego, CA 92101

Phone No. (including area code):

2 BUYER GRANTEE

Name: Douglas A. Sampson and Deborah D. Sampson, husband and wife

Mailing Address: 22504 SE 329th St

City/State/Zip: Black Diamond, WA 98010

Phone No. (including area code):

3 Send all property tax correspondence to: ☐ Same as Buyer/Grantee

Name: Douglas A. Sampson

Mailing Address: 22504 SE 329th St

City/State/Zip: Black Diamond, WA 98010

Phone No. (including area code):

List all real and personal property tax parcel account numbers – check box if personal property		List assessed value(s)
0021363003	☐	573,900.00
LC 471	☐	
	☐	
	☐	

4 Street address of property: 414 Lorenz Road KPN, Lakebay, WA 98349

This property is located in ☒ unincorporated Pierce County OR within ☒ city of Lakebay

☐ Check box if any of the listed parcels are being segregated from a larger parcel.

Legal description of property (if more space is needed, you may attach a separate sheet to each page of the affidavit)

SOUTH 200 FEET OF GOVERNMENT LOT 4 IN SECTION 36, TOWNSHIP 21 NORTH, RANGE 1 WEST OF THE W.M., IN PIERCE COUNTY, WASHINGTON.
TOGETHER WITH THE SECOND CLASS TIDELANDS ADJOINING.
SITUATED IN THE COUNTY OF PIERCE, STATE OF WASHINGTON.

5 Enter Abstract Use Categories: 11

(See back of last page for instructions)

	YES	NO
Is this property exempt from property tax per chapter 84.36 RCW (nonprofit organization)?	☐	☒

6

	YES	NO
Is this property designated as forest land per chapter 84.33 RCW?	☐	☒
Is this property classified as current use (open space, farm and agricultural, or timber) land per chapter 84.34?	☐	☒
Is this property receiving special valuation as historical property per chapter 84.26 RCW?	☐	☒

If any answers are yes, complete as instructed below.

(1) NOTICE OF CONTINUANCE (FOREST LAND OR CURRENT USE)

NEW OWNER(S): To continue the current designation as forest land or classification as current use (open space, farm and agriculture, or timber) land, **you must sign on (3) below.** The county assessor must then determine if the land transferred continues to qualify and will indicate by signing below. If the land no longer qualifies or you do not wish to continue the designation or classification, it will be removed and the compensating or additional taxes will be due and payable by the seller or transferor at the time of sale. (RCW 84.33.140 or RCW 84.34.108). Prior to signing (3) below, you may contact your local county assessor for more information.

This land ☐ does ☒ does not qualify for continuance.

DEPUTY ASSESSOR _____ DATE _____

(2) NOTICE OF COMPLIANCE (HISTORIC PROPERTY)

NEW OWNER(S): To continue special valuation as historic property, **sign (3) below.** If the new owner(s) do not wish to continue, all additional tax calculated pursuant to chapter 84.26 RCW, shall be due and payable by the seller or transferor at the time of sale.

(3) OWNER(S) SIGNATURE

_____ _____

PRINT NAME

_____ _____

7 List all personal property (tangible and intangible) included in selling price.

If claiming an exemption, list WAC number and reason for exemption:

WAC No. (Section/Subsection) _____

Reason for exemption _____

Type of Document: Special Warranty Deed

Date of Document: October 25, 2011

Gross Selling Price $	428,500.00
*Personal Property (deduct) $	
Exemption Claimed (deduct) $	
Taxable Selling Price $	428,500.00
Excise Tax: State $	5,484.80
Local $	2,142.50
*Delinquent Interest: State $	
Local $	
*Delinquent Penalty $	
Subtotal $	7,627.30
*State Technology Fee $	5.00
*Affidavit Processing Fee $	~~5.00~~
Total Due $	7,632.30

A MINIMUM OF $10.00 IS DUE IN FEE(S) AND/OR TAX
***SEE INSTRUCTIONS**

8 **I CERTIFY UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.**

Signature of Grantor or Grantor's Agent _____

Name (print): Krisha Wilson

Date & city of signing: Puyallup, 10/28/2011

Signature of Grantee or Grantee's Agent _____

Name (print): Krisha Wilson

Date & city of signing: Puyallup, 10/28/2011

Perjury is a class C felony which is punishable by imprisonment in the state correctional institution for a maximum term of not more than five years, or by a fine ... dollars ($5,000.00), or by both imprisonment and fine (RCW 9A.20.020 (1C)).

REV 8

10/31/2011 02:11:36 PM KYOHN 4272074 1 PG

EXCISE COLLECTED: $7,627.30 PROC FEE: $0.00
AUDITOR
Pierce County, WASHINGTON TECH FEE: $5.00

TREASURER'S USE ONLY — COUNTY

STATE OF WASHINGTON, County of Pierce
ss: I, Julie Anderson, of the above
entitled county, do hereby certify that this
forgoing instrument is a true and correct copy
of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of Said County.

By: _____ Deputy
Date: MAR 12 2012

NO. 42347-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

RICHARD KUNTZ AND CYNTHIA L. JOHNSON-KUNTZ,

Appellant,

v.

JPMORGAN CHASE BANK,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2012, I caused a true and correct copy of the Brief of Respondent JPMorgan Chase Bank, N.A. to be served, via messenger, upon the following counsel of record for the Appellants Richard Kuntz and Cynthia L. Johnson-Kuntz:

Jan Gossing
BTA Law Group PLLC
31811 Pacific Highway South, Suite B-101
Federal Way, WA 98003

I further certify that all parties required to be served, have been served.

DATED this 30th day of March, 2012.

Sheila Rowden